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ASIA GENERAL EQUIPMENT AND SUPPLIES SDN BHD & ORS

v.

MOHD SARI DATUK HJ NUAR & ORS

B

FEDERAL COURT, PUTRAJAYA
ZAKI TUN AZMI CJ
ZULKEFLI MAKINUDIN FCJ
JAMES FOONG FCJ
C [CIVIL APPEAL NO: 02( )-13-2010 (S)]
25 JULY 2011

CIVIL PROCEDURE: *Action - Limitation - Defence of time bar - Appeal against - Defendants' raised defence of time bar against plaintiffs' claim - Plaintiffs' right to redeem their shares - Foreclosure of plaintiffs' shares - When cause of action accrued - Whether plaintiffs' action outside limitation period - Whether doctrine of estoppel bars litigant guilty of unconscionable conduct raising limitation as defence - Plea of estoppel - Whether defendants' conduct inequitable - Boustead Trading (1985) Sdn Bhd v. Arab - Malaysian Merchant Bank Bhd - Sabah Limitation Ordinance, Items 37 & 97*

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CIVIL PROCEDURE: *Estoppel - Failure to plead - Whether estoppel should be pleaded if material facts and evidence disclosed in pleadings - Whether sufficient - Whether defendants prejudiced - Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd*

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The plaintiffs were shareholders in Multi Industries (Sabah) Sdn Bhd ('the company'). On 9 February 1983, the plaintiffs, the company and the 1st defendant entered into a loan agreement ('loan agreement') whereby the 1st defendant agreed to lend the company a sum of RM3 million free from all interest for a period of five years ('loan period') till 31 December 1987. This loan was intended to repay Sabah Bank Bhd ('the bank'), which had granted financial facilities to the company for which the plaintiffs were guarantors. In consideration of this loan, the plaintiffs transferred their shareholdings ('plaintiffs' shares') in the company, as well as the management of the company to the 1st defendant, its nominee or nominees, being the 2nd, 3rd and 4th defendants. During the loan period, the 1st to the 4th defendants were entitled to all the dividends and benefits as registered shareholders of the company. Under the terms of the loan agreement, the loan

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was to be disbursed by the 1st defendant to the company in 60 monthly instalments of RM50,000 each commencing from 1 January 1983. Instead of disbursing the loan to repay the bank, the 1st to the 4th defendants had subjected the company to more liabilities. After the loan period had expired, the plaintiffs did not pursue their rights to redeem their shares. On 13 July 1995, the 1st defendant wrote to the plaintiffs informing that despite having granted the loan of RM3 million to the company, the company had not repaid him and due to that, all the shareholdings would be foreclosed in accordance with the provisions of the said loan agreement. The 1st defendant had then injected fresh capital into the company whereby 14 million fully paid up shares were issued to the 5th defendant. On 17 October 1997, the plaintiffs commenced this action against the defendants. The plaintiffs applied for *inter alia*, a declaration that the alleged foreclosure was null and void and redemption of the mortgage of the said shares be re-transferred to the plaintiffs. The defendants raised limitation as a defence to defeat the plaintiffs' action. In the High Court, the defendants were estopped from relying on the said defence and the plaintiffs' claim was allowed. Dissatisfied with the decision, the defendants appealed to the Court of Appeal whereby their appeal was allowed solely on the ground that the plaintiffs' claim was time barred. The plaintiffs' leave to appeal was granted by this court based on two questions, namely (i) whether the doctrine of estoppels barred a litigant who was guilty of unconscionable conduct from raising and relying on limitation as a defence and (ii) whether the cause of action founded upon the right to redeem a mortgage and the conversion of mortgaged shares accrued upon the 1st defendant's letter dated 13 July 1995.

Held (allowing the appeal with costs; affirming High Court order)

Per James Foong FCJ delivering the judgment of the court:

(1) Though the equitable doctrine of estoppel is available in law, to be successfully invoked requires meticulous examination of the facts in each case to ascertain whether there was any inequitable conduct. (*Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham*) (para 31)

(2) When the trial judge had come to a conclusion that the plaintiffs had successfully established estoppel, the Court of Appeal should not have disturbed this finding of fact. Further,

A the trial judge had also found that due to the 1st defendant's improper conduct, the plaintiffs were prevented from filing this action earlier. This was a finding of fact which was supported by cogent evidence. The Court of Appeal should not have replaced it with one of its own to prevent the plaintiffs from
B pursuing their claim by a defence of limitation. (paras 32 & 33)

(3) It had been established in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* that there was no necessity
C to include a plea of estoppel in the pleadings if the material facts and evidence giving rise to this doctrine was disclosed in the pleadings itself. The plaintiffs had in their amended reply pleaded material facts to support a claim for estoppel and this was sufficient to prevent such claim from being defeated by
D the lack of an explicit statement to say so. Further, such disclosure of material facts and evidence in the plaintiffs' reply would have provided sufficient information and time to the defendants to have met the plaintiffs' allegation. Thus, the defendants were not prejudiced. (para 35)

E **(4)** Limitation ran from the time when the plaintiffs, as mortgagees, had a right to redeem their shares. Such right would have been after 31 December 1987, when the loan period expired as provided by cl. 2 of the loan agreement. It could not have
F commenced from the date when the 1st defendant, as mortgagor, foreclosed on the plaintiffs' shares. The plaintiffs' shares may have been affected by the 1st defendant's letter of 13 July 1995 but the plaintiffs' right to sue commenced only after 31 December 1987. The right of the mortgagees for the
G purpose of limitation must have been from the time when their right to sue accrued and in this case, as it stands, must be after 31 December 1987. This was the time when the plaintiffs' right as mortgagees to redeem their mortgaged property commenced. It should not have been calculated from
H the time when their right was affected. Since no limitation period was prescribed, the law of limitation under item 97 of the Sabah Limitation Ordinance was a period of six years from the time when the plaintiffs' right to sue accrued. (para 38)

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(5) The plaintiffs' right to sue for conversion of their shares by the 1st defendant accrued when the said conversion took place. The act of conversion by the 1st defendant was when he had foreclosed on the plaintiffs' shares. This was on 13 July 1995 when he gave notice to the plaintiffs. The time to calculate limitation under item 37 of the Sabah Limitation Ordinance is 3 years. (para 39)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif-plaintif adalah pemegang saham di Multi Industries (Sabah) Sdn Bhd ('syarikat tersebut'). Pada 9 Februari 1983, plaintif-plaintif, syarikat tersebut dan defendan pertama telah memasuki satu perjanjian pinjaman ('perjanjian pinjaman') di mana defendan pertama telah bersetuju untuk memberi pinjaman bagi jumlah RM3 juta kepada syarikat tersebut bebas daripada semua faedah bagi tempoh lima tahun ('tempoh pinjaman') sehingga 31 Disember 1987. Pinjaman ini adalah bertujuan untuk membayar balik Sabah Bank Bhd. ('bank tersebut') yang telah memberi kemudahan pinjaman kepada syarikat tersebut di mana plaintif-plaintif merupakan penjamin. Sebagai balasan bagi pinjaman tersebut, plaintif-plaintif telah memindahmilik pegangan saham mereka ('saham plaintif-plaintif') di dalam syarikat tersebut bersama-sama dengan pengurusan syarikat tersebut kepada defendan pertama, calonnya atau calon-calonnya, iaitu defendan-defendan kedua, ketiga dan keempat. Semasa tempoh pinjaman, defendan-defendan pertama hingga keempat adalah layak kepada segala dividen dan faedah sebagai pemegang saham berdaftar syarikat tersebut. Di bawah terma perjanjian pinjaman, bayaran akan dikeluarkan oleh defendan pertama kepada syarikat tersebut dalam 60 ansuran bulanan sebanyak RM50,000 setiap satu bermula dari 1 Januari 1983. Tanpa mengeluarkan pinjaman untuk membayar balik bank tersebut, defendan-defendan pertama hingga keempat telah memberi syarikat tersebut lebih banyak liabiliti-liabiliti. Selepas tempoh pinjaman tamat, plaintif-plaintif tidak meneruskan hak mereka untuk menebus saham mereka. Pada 13 Julai 1995, defendan pertama telah menulis kepada plaintif-plaintif bahawa walau pun pinjaman sebanyak RM3 juta telah diberikan kepada syarikat tersebut, malah, syarikat tersebut tidak membayarnya balik dan oleh yang demikian, segala pegangan saham akan dihalang tebus seperti yang terkandung di dalam peruntukan perjanjian pinjaman tersebut. Defendan pertama telah kemudiannya memasuki kapital baru ke dalam syarikat tersebut di mana 14 juta saham berbayar penuh telah diberikan kepada defendan kelima. Pada

A 17 Oktober 1997, plaintif-plaintif telah memulakan tindakan ini terhadap defendan-defendan. Plaintif-plaintif telah memohon, *inter alia*, satu deklarasi bahawa halang tebus yang didakwa itu adalah batal dan tidak sah dan penebusan gadaian bagi saham-saham tersebut dipindahmilik kembali kepada plaintif-plaintif. Defendan-
B defendan telah membangkitkan pembelaan had masa bagi mengalahkan tuntutan plaintif-plaintif. Di Mahkamah Tinggi, defendan-defendan telah diestop daripada bergantung kepada pembelaan tersebut dan tuntutan plaintif-plaintif telah dibenarkan. Tidak puas hati dengan keputusan tersebut, defendan-defendan
C telah merayu ke Mahkamah Rayuan di mana rayuan mereka telah dibenarkan hanya atas alasan bahawa tuntutan plaintif-plaintif dihad masa. Kebenaran merayu plaintif-plaintif dibenarkan oleh mahkamah ini berdasarkan dua soalan, iaitu (i) sama ada doktrin estopel menghalang seseorang litigan yang bersalah bagi perbuatan
D yang tidak adil daripada membangkit dan bergantung kepada pembelaan had masa dan (ii) sama ada kausa tindakan bagi menembus gadai-janji dan penukaran saham tergadai mula terakru berasaskan surat defendan pertama bertarikh 13 Julai 1995.

E **Diputuskan (membenarkan rayuan dengan kos; mengesahkan perintah Mahkamah Tinggi)**

Oleh James Foong HMP menyampaikan penghakiman mahkamah:

F **(1)** Walau pun prinsip ekuiti estopel sedia ada di undang-undang, bagi ianya berjaya digunakan memerlukan pengajian fakta-fakta secara terperinci bagi menentukan sama ada terdapat perbuatan yang tidak berekuiti. (*Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham*)

G **(2)** Apabila hakim bicara telah sampai ke satu kesimpulan bahawa plaintif-plaintif telah berjaya membuktikan estopel, Mahkamah Rayuan tidak sepatutnya mengganggu pencarian fakta tersebut. Lagipun, hakim bicara juga telah mendapati bahawa disebabkan perbuatan tidak wajar defendan pertama, plaintif-plaintif telah
H dihalang daripada memfailkan tindakan ini lebih awal lagi. Ini adalah satu pencarian fakta yang telah disokong oleh keterangan yang kukuh. Mahkamah Rayuan tidak sepatutnya menggantikannya dengan sendiri untuk menghalang plaintif-plaintif daripada meneruskan tuntutan mereka oleh pembelaan
I had masa.

(3) Ianya telah dibuktikan dalam *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* bahawa tiada keperluan untuk menyertakan rayuan estopel di dalam pliding jika fakta-fakta material dan keterangan yang membangkitkan doktrin ini telah dikemukakan di dalam pliding sendiri. Plaintif-plaintif telah di dalam pindaan kepada jawapan mereka memplidkan fakta-fakta material untuk menyokong tuntutan estopel dan ini adalah memadai bagi menghalang tuntutan sebegitu daripada dikalahkan disebabkan kekurangan kenyataan jelas bagi menyatakan sedemikian. Lagi pun, pengemukaan fakta-fakta material sebegitu dan keterangan di dalam jawapan plaintif-plaintif tersebut telah membekalkan maklumat yang memadai dan masa kepada defendan-defendan bagi memenuhi dakwaan-dakwaan plaintif-plaintif. Oleh yang demikian, defendan-defendan tidak diprejudiskan.

(4) Had masa lari daripada masa plaintif-plaintif, sebagai pemegang gadai-janji, mempunyai hak untuk menebus saham mereka. Hak sedemikian adalah selepas 31 Disember 1987, apabila tempoh pinjaman tamat seperti diperuntukkan dalam klausa 2 perjanjian pinjaman. Ianya tidak mungkin bermula dari tarikh apabila defendan pertama, sebagai pemberi gadai-janji, menghalang tebus saham plaintif-plaintif. Saham plaintif-plaintif mungkin terbabit oleh surat defendan pertama bertarikh 13 Julai 1995 tetapi hak plaintif-plaintif untuk memulakan tuntutan bermula hanya selepas 31 Disember 1987. Hak pemegang gadai-janji bagi kehendak had masa adalah dari masa apabila hak untuk menuntut bermula dan di dalam kes ini, ianya mestilah selepas 31 Disember 1987. Ini adalah masa apabila hak plaintif-plaintif sebagai pemegang gadai-janji untuk menebus harta tergadai bermula. Ianya tidak boleh dikira dari masa apabila hak mereka terbabit. Memandangkan tiada had masa dinyatakan untuk memenuhi keadaan, undang-undang had masa di bawah item 97 Ordinan Had Masa Sabah adalah bagi tempoh enam tahun dari masa apabila hak plaintif-plaintif untuk menuntut bermula.

(5) Hak plaintif-plaintif untuk menuntut terhadap penukaran saham mereka oleh defendan pertama bermula apabila penukaran tersebut bermula. Tindakan penukaran oleh defendan pertama adalah semasa beliau menghalang tebus saham plaintif-plaintif. Ini adalah pada 13 Julai 1995 apabila beliau memberi notis kepada plaintif-plaintif. Masa untuk mengira had masa di bawah item 37 Ordinan Had Masa Sabah adalah tiga tahun.

Case(s) referred to:

Alfred Templeton & Ors v. Mount Pleasure Corp Sdn Bhd [1989] 1 CLJ 693; [1989] 1 CLJ (Rep) 219 HC ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC ***(refd)***

Loh Hoot Yeang v. Derrick Edwin David [2006] 2 CLJ 66 CA ***(refd)***

Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham [1998] 4 CLJ 812 CA ***(refd)***

Legislation referred to:

Sabah Limitation Ordinance, items 37, 97

For the appellants - Joseph Lee (Lim Pitt Kong with him); M/s PK Lim & Co
For the respondents - David Fung; M/s Alex Pang & Co

[Appeal from Court of Appeal; Civil Appeal No: S-02-817-2008]

[Editor's note: For the Court of Appeal judgment, please see Mohd Sari Datuk Okk Hj Nuar & Ors v. Asia General Equipment And Supplies Sdn Bhd & Ors [2010] 6 CLJ 756.]

Reported by Kumitha Abdul Majid

JUDGMENT

James Foong FCJ:

Introduction

[1] This appeal involves limitation period to bring an action. For ease of reading, we shall refer to the parties as they were in the court of first instance. And to appreciate the questions posed to us, we shall begin with the facts.

Facts

[2] The plaintiffs were shareholders in a private limited company known as Steel Furniture Centre (Sabah) Sdn Bhd (the company). The name of the company was subsequently changed to Multi Industries (Sabah) Sdn Bhd.

[3] On 9 February 1983, the plaintiffs, the company and the 1st defendant entered into a loan agreement ("loan agreement") where the 1st defendant agreed to lend the company a sum of RM3 million free from all interest for a period of five years ("loan period"). This period ended on 31 December 1987. In consideration for this loan, the plaintiffs transferred their

shareholdings ("plaintiffs' shares") in the company, as well as the management of the company, to the 1st defendant, its nominee or nominees. The 2nd, 3rd and 4th defendants were nominees of the 1st defendant. This loan to the company was intended to repay Sabah Bank Bhd ("the bank"), which had granted financial facilities to the company for which the plaintiffs were the guarantors. During the loan period, the 1st, 2nd, 3rd and 4th defendants were entitled to all the dividends and benefits as registered shareholders of the company.

[4] To safeguard the interest of the plaintiffs, the 1st, 2nd, 3rd and 4th defendants agreed not to, during the loan period, transfer, assign, dispose or otherwise encumber the plaintiffs' shares nor procure the increase or decrease the issued share capital of the company. To further protect the interest of the plaintiffs, the 1st, 2nd, 3rd and 4th defendants executed share transfer forms in respect of the plaintiffs' shares in escrow. These were kept by a firm of solicitors as stakeholder.

[5] Under the terms of the loan agreement, the loan was to be disbursed by the 1st defendant to the company in 60 monthly instalments of RM50,000 each commencing from the 1 January 1983. But instead of disbursing the loan to repay the bank, the 1st, 2nd, 3rd and 4th defendant subjected the company to more liabilities. And as at 10 September 1997, the company owed the bank a staggering sum of RM13,856,136.86. To avoid legal action by the bank, the company serviced only the loan interest.

[6] After the loan period had expired, the plaintiffs did not pursue their rights to redeem their shares. Then on 13 July 1995, the 1st defendant wrote to one of the plaintiffs informing him that despite having granted the loan of RM3 million to the company, the company had not repaid him. He then proceeded to claim that "by reason of the debt of the said company in the repayment of the loan to me, I have caused to foreclose all the shareholdings pledged to me by you and other shareholders in accordance with the provisions of the said agreement (loan agreement)".

[7] Then on 10 September 1997, the 1st defendant injected fresh capital into the company. This enabled the company to pay off its loan due to the bank resulting in the release of the plaintiffs as guarantors. With this injection of fresh capital, the company issued 14 million fully paid up shares in the company to the 5th defendant.

[8] Not long thereafter on 17 October 1997, the plaintiffs commenced this action against the defendants.

Statement Of Claim

[9] The nature of the plaintiffs' claim, as pleaded, is as follows.

[10] In para. 1 of the statement of claim, the plaintiffs averred that "by way of security" the plaintiffs' shares were transferred to the 1st defendant and his nominees to secure a loan of RM3 million to the company.

[11] Then in para. 2, the plaintiffs declared that the "transfer by way of security as aforesaid was in law and in equity a mortgage of the said shares".

[12] In para. 9, the plaintiffs said that there was no demand made on them by the 1st defendant to repay the loan nor were they aware of any similar demand made to the company.

[13] Then in the subsequent paragraphs, the plaintiffs disclosed the notice of foreclosure by 1st defendant on the plaintiffs' shares which they claim is void and of no effect since it is "a clog on the equity of redemption".

[14] And in the alternative, the plaintiffs pleaded that the 1st defendant's foreclosure constituted conversion of their shares to the defendants' own use thus depriving them of their right to these shares.

[15] Further, they alleged that the defendants as trustees for the plaintiffs' shares should render accounts to the plaintiffs.

[16] For reliefs, the following were sought:

(a) A declaration that the foreclosure is null and void.

(b) Redemption of the mortgage of the plaintiffs' shares and the same be re-transferred to the plaintiffs.

(c) Alternatively, the plaintiffs be allowed to redeem the plaintiffs' shares upon repayment by the company of the loan.

(d) The defendants resign as directors of the company to be replaced by the plaintiffs and that the management and control of the company be given to the plaintiffs.

(e) An injunction to restrain the defendants from enforcing the foreclosure, encumbering the company, or selling, transferring, charging and pledging the plaintiffs' shares as well as the company's land.

(f) A declaration that the defendants hold the plaintiffs' shares on trust for the plaintiffs.

(g) Alternatively, damages for conversion.

(h) An account be taken of the company's expenditure from 31 December 1987 and if found due to pay the plaintiffs such sum with interest.

(i) Costs.

High Court

[17] After a lengthy trial, the High Court listed out six issues and made the following ruling.

1st Issue: Whether There Was Transfer Of The Plaintiffs' Shares To The 1st Defendant And His Nominees?

[18] In respect of this, the trial judge answered it by first declaring:

> Upon the hearing and reading the Agreement dated 9th February 1983, I note that the essence of the contract was that in consideration for the exclusive control of the Company for five (5) years, the 1st Defendant would pay RM6 million to Sabah Bank within the five (5) years in repayment of the Company's debt, RM3 million of which was an interest-free loan repayable.

[19] But then in the last paragraph on this issue, he said:

> I am of the view that there was an agreement for the sale of shares between the parties. As such there is a valid contract between the parties.

2nd Issue: What Are The Terms And Obligations Between The Parties?

[20] For this 2nd issue, the trial judge virtually repeated all the relevant terms in the loan agreement.

3rd Issue: Who Breached The Contract?

[21] On this, the trial judge found against the 1st defendant and supported it with the following:

(a) The 1st defendant transferred the shares away in 1986 even before the loan period has expired; this is in breach of cl. 13 of the loan agreement.

(b) The 1st defendant failed to pay the agreed monthly instalments on behalf of the company to the bank resulting in an increase in the company's liability to the bank.

(c) The 1st defendant increased the share capital of the company and allotted these shares to the 5th defendant which is contrary to cl. 13 of the loan agreement.

(d) As a result of these breaches, the 1st defendant had "made a complete mockery of the contract. With the company under his control with a new name to boot, he now comes to court asking for equitable defences of abandonment, waiver and acquiescence. But equity does not assist a man who comes with unclean hands. To do so would be awarding him for his breaches".

(e) And finally, though the 1st defendant injected capital into the company to repay the bank "he did nothing more than to discharge his contractual obligation under the contract".

4th Issue: Whether The Plaintiffs' Claim Is Statute Barred?

[22] The trial judge was of the view that estoppel applied. He found that the defendants were "estopped from using limitation to defeat plaintiffs' cause of action based on the peculiar nature of this case". He then went on to add that, "there is no necessity to expressly include estoppel (in the pleadings) so long as the material facts and evidence giving rise to estoppel is pleaded". The case of *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283 was cited in support of this proposition.

5th Issue: Whether The Plaintiffs Have Abandoned Their Claim?

[23] On this the High Court ruled:

> Once you foreclose your shares then you cannot argue on abandonment, waiver and acquiescence. Foreclose means: you realize the payment of the debt. Clearly, there is no evidence here on abandonment, waiver and acquiescence.

6th Issue: Whether The Plaintiffs Had By Their Conduct Acquiesced And Waived Their Rights To Insist On The Re-transfer Of The Shares In The Company Under The Said Loan Agreement

[24] For this, the trial judge said:

> I hold that the Plaintiff had not by their conduct acquiesced or waived their rights to insist on the re-transfer of the shares in the Company under the said Loan Agreement.

[25] In conclusion, the High Court allowed the plaintiffs' claim with costs.

Court Of Appeal

[26] Dissatisfied with this decision, the defendants appealed to the Court of Appeal. The Court of Appeal allowed the appeal solely on the ground that the plaintiffs' claim was time barred and gave the following reasons:

> We feel that this limitation defence stood independent of the merits since the cause of action by the plaintiffs is to enforce a written agreement and as such limitation applies ... Our reasons for allowing this appeal now follow.
>
> The agreement period was from 1.1.1983 till 31.12.1987. The Plaintiffs chose not to commence any action until almost 10 years (filing of this suit was on 17.10.1997) and long after the expiry of the agreement period, which we put as 31.12.1987.
>
> S. 3 of the Limitation Ordinance (Sabah Cap 7) in peremptory language states that 'every suit instituted after the period of limitation prescribed therefore by the Schedule shall be dismissed'...
>
> The Plaintiffs in their Amended Reply denied that the action was time barred and averred at para 5.2(a):
>
> > that the said Agreement was not a mere loan agreement, but that under it the said shares were mortgaged to the 1st Defendant by way of security to secure the loan of RM3,000,000.00 to be lent to the Company by the 1st Defendant, and as such, the equity of redemption is not destroyed by the passage of time as the said shares are still available, and the redemption sum could still be paid ...
>
> And since this foreclosure of the said shares occurred on 13.7.1995 ... it was only from that date (13.7.1995) that the Plaintiff lost their rights to redeem. He further contended that the foreclosure was actually a clog on the Plaintiffs' equity of

A redemption. Time therefore runs from that date. As such the Plaintiffs had not been time-barred when this action was filed on 17.10.1997.

The second thrust of the Plaintiffs' argument is that the 1st Defendant had committed various breaches of the Agreement ... and this was accepted by the learned trial judge, that the transgressions from those breaches amounted to a clog on the Plaintiffs' equity of redemption ...

We are of the view that the cause of action is founded on contract and the breaches of the Agreement. These breaches were alleged to have occurred since May 1984. The learned judge had used the doctrine of estoppel to bar the Defendants from raising the limitation defence and referred to the passage in *Loh Hoot Yeang v. Derrick Edwin David* [2006] 2 CLJ 66 ... With respect, we think that this passage was taken out of context to the argument on limitation ... The passage quoted thus must be confined to that part of the trial judge's finding only ie, that the appellant could no longer deny the existence of a contract. It is not a pronouncement that due to the breaches committed by a party, that party is thus estopped from raising the statutory defence of limitation ...

On the clog of the equity of redemption argument ... would only arise if by a provision in the mortgage deed or in this instance the Agreement, the mortgagor is prevented from redeeming its mortgaged property. This does not arise in this case.

The Agreement between the parties ended on 31.12.1987 ie, at the end of the loan period. The shares were redeemable by the Plaintiff under cl. 6 of the Agreement, or at the latest on that expiry date. In fact when the purported breach arise as early as 9 May 1984, when the Defendants failed to release the loan, resulting in the amount owed to Sabah Bank to accumulate, the Plaintiffs should have then pursued their rights to redeem. But they chose to wait and see. The cause of action arose at the latest on 1.1.1988 ie, the day after the expiry of the Agreement. We are of the view that the Plaintiffs have slept too long on their right, having filed this action almost 10 years later.

Questions Before The Federal Court

[27] Leave to appeal was granted by this court on two questions:

(a) Whether the doctrine of estoppel bars a litigant who is guilty of unconscionable conduct from raising and relying on limitation as a defence.

(b) Whether the causes of action founded upon:

(i) the right to redeem a mortgage; and

(ii) the conversion of mortgaged shares

accrue upon the letter dated 13 July 1995 issued to the plaintiffs by the 1st defendant.

Analysis

1st Question: Whether The Doctrine Of Estoppel Bars A Litigant Who Is Guilty Of Unconscionable Conduct From Raising And Relying On Limitation As A Defence

[28] Regrettably, the Court of Appeal has failed to consider the case of *Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank Bhd (supra)* in their judgment. In this case, the Federal Court has declared that:

> The time has come for this Court to recognize that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstance of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.
>
> Edgar Joseph Jr (as he then was) in an illuminating judgment in *Alfred Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 at p. 244 applied the doctrine in a broad and liberal fashion to prevent a defendant from relying upon the provisions of the Limitation Act 1952.

[29] In fact, the factual matrix in *Alfred Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor* [1989] 1 CLJ 693; [1989] 1 CLJ (Rep) 219 is very similar to that of our present case. There, the sale of the land to the defendant was conditional upon a right of way preserved in favour of the plaintiff. The defendant disregarded this condition in the agreement and set up limitation as a defence when they were sued by the plaintiff for breach of this condition. Justice Edgar Joseph Jr J decided that:

> So far as may be necessary, I would hold that based on these dicta the Limitation Act is purely procedural: see *Othman and Anor v. Mek and Michell v. Harris Engineering Co Ltd* And, therefore, in certain circumstances, one can estop oneself out of the Limitation Act by conduct.

[30] In the present case, the Court of Appeal attempted to distinguish *Loh Hoot Yeang v. Derrick Edwin David* [2006] 2 CLJ 66, a decision of the same court which has also accepted that estoppel can defeat a defence of limitation on facts. The Court of Appeal circumvented this by saying that the pronouncement in *Loh Hoot Yeang v. Derrick Edwin David* is restricted "to that part of the trial judge's finding only". We cannot appreciate this kind of reasoning when the general principle of law has been clearly set out not only by the Court of Appeal in an earlier case but also by the Federal Court. To disregard such an established principle under the guise of some flimsy and incomprehensible reason is highly unsatisfactory and must be discouraged. Here we like to reiterate that the doctrine of *stare decisis* must be adhered to by a court or courts below otherwise there will be uncertainty in the law and this would cause severe confusion. Judges in the court below should refrain from changing the law set by a superior court under the guise of distinguishing the case on facts. Unless the factual matrix is fundamentally different, established principle laid down by a superior court must be followed. Failure to do so, as in this case, amounts to a wrong application of the law.

[31] However, we must stress that though the equitable doctrine of estoppel is available in law, to be successfully invoked requires meticulous examination of the facts in each case to ascertain whether there was any inequitable conduct - see *Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham* [1998] 4 CLJ 812; [1998] 4 MLJ 651 @ 664:

[32] In this instance, when the trial judge having undertaken this onerous task and came to a conclusion that the plaintiffs have successfully established estoppel, the Court of Appeal should not have disturbed this finding of fact.

[33] Further, the trial judge also found that due to the 1st defendant's improper conduct the plaintiffs were prevented from filing this action earlier. Again, this is a finding of fact supported by cogent evidence. The Court of Appeal should not have replaced it with one of its own to prevent the plaintiffs from pursuing their claim by a defence of limitation.

[34] Before we depart from this subject we would like to discuss the defendant's objections that the plaintiffs' had delayed raising estoppel in their pleadings and had failed to expressly plead the same.

[35] On these issues, it is unnecessary for us to give a lengthy exposition since firstly it has already been established in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd (supra)* that there is no necessity to include a plea of estoppel in the pleadings if the material facts and evidence giving rise to this doctrine is disclosed in the pleadings itself. In this instance, the plaintiffs had in their amended reply pleaded material facts to support a claim for estoppel and this, for the purpose of this case, is sufficient, in our opinion, to prevent such claim from being defeated by the lack of an explicit statement to say so. Further, such disclosure of material facts and evidence in the plaintiffs' reply would have provided sufficient information and time to the defendants to meet this plaintiffs' allegation; thus, the defendants were not prejudiced by it.

[36] For reasons aforesaid, our answer to the first question is in the positive.

2nd Question: Whether The Causes Of Action Founded Upon: (A) The Right To Redeem A Mortgage; And (B) The Conversion Of Mortgaged Shares Accrue Upon The Letter Dated 13 July 1995 Issued To The Plaintiffs By The 1st Defendant

[37] Since we have accepted estoppel applies in this case to defeat a defence of limitation, this second question is academic. Nevertheless, for completeness we shall answer it.

[38] The pleaded case of the plaintiffs is based on a number of causes of action; some pleaded in the alternative. For the return of the plaintiffs' shares, the cause of action is redemption. For this cause of action, limitation runs from the time when the plaintiffs, as mortgagees, have a right to redeem their shares. Such right would be after 31 December 1987, when the loan period expired as provided by cl. 2 of the loan agreement. In our view, it could not have commenced from the date when the 1st defendant, as mortgagor, foreclosed on the plaintiffs' shares. The plaintiffs' shares may have been affected by the 1st defendant's letter of 13 July 1995 but the plaintiffs' right to sue commenced only after 31 December 1987. Foreclosure is the right of the mortgagor (the 1st defendant) not that of the mortgagees (the plaintiffs). The right of the mortgagees for the purpose of limitation must be from the time when their right to sue accrues and in this case, as it stands, must be after 31 December 1987. This is the time when

A the plaintiffs' right as mortgagees to redeem their mortgaged property commenced. It should not be calculated from the time when their right was affected. For the purpose of this case, since no limitation period is prescribed to fit the circumstances of this case, the law of limitation under item 97 of the Sabah Limitation
B Ordinance is a period of six years from the time when the plaintiffs' right to sue accrues.

[39] As for the plaintiffs' cause of action for conversion of their shares by the 1st defendant this requires different treatment for
C calculating limitation. The right to sue for this cause of action accrues when the conversion took place. In this instance, the act of conversion by the 1st defendant was when he foreclosed on the plaintiffs' shares. This was on 13 July 1995 when he gave notice to the plaintiffs. The time to calculate limitation under
D item 37 of the Sabah Limitation Ordinance is three years "when the person having the right to the possession of the property first learns in whose possession it is".

[40] With the aforesaid, our answer to the 2nd question is in the
E manner as illustrated.

Conclusion

[41] Having examined and considered all facts, we allow this appeal with costs (having being informed that the respondents had
F withdrawn all other grounds of appeal before the Court of Appeal except for limitation). The order of the Court of Appeal is set aside. The order of the High Court affirmed.

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